Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO R3(1)–25–262 OF 2004
MOHAMAD ARIFF JC
12 DECEMBER 2008

Administrative Law — Judicial review — Certiorari — Application to quash decision of Consumer Claims Tribunal — Whether application supported by evidence — Whether tribunal fell foul of acceptable standards of administrative law and justice

The applicant bought a new car and, according to the evidence, the applicant had complained to the service centre ('respondent') about the car brakes during the first service. Three months after the purchase and during the third service, the applicant had again complained of the malfunction of the car brakes. Subsequently the car driven by the applicant's husband collided with another car allegedly due to the malfunction of the car brakes, on the way from the respondent's centre. The Consumer Claims Tribunal ('tribunal') had considered the arguments of both parties as well as the relevant documentary evidence and decided that the applicant must submit an independent report in respect to the performance of the brakes of the car to rebut the documentary evidence submitted by the respondent. In the absence of such reports by the applicant, the documentary evidence of the respondent that the brake performance had been tested and passed would prevail. Hence, this application by the applicant for judicial review under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash the award of the tribunal, which dismissed the applicant's claim against the first respondent.

Held, dismissing the application with costs:

(1) Based on the evidence submitted the tribunal made a finding of facts. The court would not investigate the merits or justification of the decision based on facts and evidence found by the tribunal. The first principle of judicial review concerned the decision making process and not the merits, substance or justification. The second principle is that there can be an exception to the first principle where the court could examine the substance or justification to satisfy itself that the decision maker had not transgressed the principles of procedural impropriety,

illegality or irrationality. However, on the facts of the application, there was no evidence to support a review of the tribunal's decision (see para 12).

(2) The decision of the tribunal was final and enforceable as an order of the magistrate's court when recorded with the court. The statutory framework is a clear indication that the High Court should be wary of examining the merits or substance of the tribunal's decisions, but should exercise its corrective jurisdiction only where it is clear that the tribunal had fallen foul of the acceptable standards of administrative law and justice, or administrative governance. To adopt a contrary stand would mean this court would be using the remedy of certiorari 'to cloak the exercise of appellate power'. The tribunal had not transgressed any of the principles of control (see para 13). *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison Bin Baba* [1988] 2 MLJ 372 referred.

[Bahasa Malaysia summary

Pemohon telah membeli sebuah kereta baru dan, menurut bukti, pemohon telah mengadu kepada pusat servis ('responden') mengenai brek kereta tersebut semasa servis pertama. Tiga bulan selepas pembelian dan semasa servis ketiga, pemohon sekali lagi telah mengadu mengenai kepincangan brek-brek kereta tersebut. Kemudian kereta tersebut yang dipandu oleh suami pemohon telah berlanggar dengan sebuah lagi kereta yang didakwa kerana kepincangan brek kereta tersebut, dalam perjalanan dari pusat responden. Tribunal Tuntutan Pengguna ('tribunal') telah mempertimbangkan hujahan kedua-dua pihak serta bukti dokumentar yang relevan dan memutuskan bahawa pemohon mesti mengemukakan satu laporan bebas berkaitan dengan prestasi brek bagi kereta tersebut untuk menyangkal keterangan dokumentar yang kemukakan oleh responden. Dalam ketiadaan laporan-laporan seumpamanya oleh pemohon, keterangan dokumentar responden bahawa prestasi brek telah diuji dan diluluskan lebih mengatasi. Maka permohonan oleh pemohon untuk semakan kehakiman di bawah A 53 Kaedah-Keadah Mahkamah Tinggi 1980 bagi satu perintah certiorari untuk membatalkan award tribunal, yang menolak tuntutan pemohon terhadap responden pertama.

Diputuskan, menolak permohonan dengan kos:

(1) Berdasarkan bukti yang telah dikemukakan tribunal telah membuat satu penemuan fakta. Mahkamah akan tak menyiasat merit atau justifikasi keputusan yang berdasarkan fakta-fakta dan bukti yang dibuat oleh tribunal. Prinsip pertama semakan kehakiman adalah berkenaan proses membuat keputusan dan bukannya merit, kandungan

atau justifikasi. Prinsip kedua adalah ia boleh menjadi satu pengecualian untuk prinsip pertama di mana mahkamah boleh memeriksa kandungan atau justifikasi bagi memenuhi kehendak sendiri bahawa pembuat keputusan tidak melanggar prinsip-prinsip salah laku prosedur, ketaksahan atau tidak rasional. Walau bagaimanapun, di atas fakta bagi permohonan ini, tidak ada bukti untuk menyokong semakan keputusan tribunal (lihat perenggan 12).

(2) Keputusan tribunal adalah muktamad dan boleh dikuatkuasakan seperti satu perintah mahkamah majistret apabila direkodkan dengan mahkamah. Kerangka kerja berkanun itu adalah satu petunjuk jelas yang Mahkamah Tinggi patut berwaspada dari mengkaji merit atau bahan keputusan tribunal, tetapi harus melaksanakan bidang kuasa pembetulannya hanya di mana adalah jelas bahawa tribunal telah gagal menuruti piawaian yang boleh diterima undang-undang pentadbiran dan keadilan, atau pentadbiran mentadbir. Untuk mengambil satu pendirian bertentangan akan bermaksud bahawa mahkamah ini akan menggunakan remedi certiorari 'untuk menyelimuti penggunaan kuasa rayuan'. Tribunal tidak melanggar mana-mana prinsip bagi kawalan tersebut (lihat perenggan 13). *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1988] 2 MLJ 372 dirujuk.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–208.

Cases referred to

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, CA (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh [1997] 1 MLJ 789, SC (refd)

Pearlman v Keepers and Governors of Harrow School [1979] QB 56 CA (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372, CA (refd)

Tanjung Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 1 MLJ 124, SC (refd)

Thanggaya v MAS (Judicial Review No R3–25–320 of 2006) (distd)

Legislation referred to

Consumer Protection Act 1999
Rules of the High Court 1980 O 53

Aedyla Bohari (Muhd Fadzli Muhd Yusoff and Pon Malar with him) (Rastam Singa & Co) for the appellant.
Justin Voon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the respondent.

Mohamad Ariff JC:

[1] This case concerns an application for judicial review under O 53 of the Rules of the High Court for an order of certiorari to quash the award of the Consumer Claims Tribunal which dismissed the applicant's claim against the first respondent for payment of damages of RM15,747. The material facts are quite ordinary and can be stated briefly. The applicant had bought a new Proton Iswara car. According to the evidence, during the first service at the Proton Edar service centre, her husband complained about the car breaks. Again, during the third service of the car, about three months after the purchase of the car, the husband also complained about the brakes. On the same day, when her husband took the car from the service centre and was driving home, he collided with another car in front because the brakes failed. As apparent from exh SS7 to encl 9 (the affidavit in reply of the applicant), the tribunal had considered the arguments by both parties as well as the relevant documentary evidence. The president of the tribunal then decided as follows:

> My hands are tied, I'm bound by documentary evidence as in collection slip in service order about the performance of the brake and also report by PUSPAKOM that the brake performance had been tested and passed. To rebut these two documentary evidence, *pihak yang menuntut* must come out with independent or neutral report about the performance of the brake. In the absence of that these two reports are sustainable.

[2] In another claim that was brought before this court where judicial review was applied for to quash the decision of the Consumer Claims Tribunal, I had occasion to analyse the statutory framework within which this Consumer Claims Tribunal has to operate. Such an analysis is important, in my view, to define the exact parameters of the court's judicial review jurisdiction and powers in this special context. That the claim is *Thanggaya v MAS* (Judicial Review No R3–25–320 of 2006) where I allowed the application for judicial review and quashed the award of the Consumer Claims Tribunal on the special facts of the case since there was a clear error of law which required corrective action in the interest of justice and good administration. The applicant had claimed for a refund of airline tickets that

A he had bought in advance, but the airline refused the refund based on an incorrect reading of the relevant contract of carriage — a clear error of law that was countenanced by the tribunal.

B **[3]** I incorporate the line of reasoning I adopted in that case here. In analysing the statutory framework I stated the following:

> Section 116(1) of the Act makes it clear that an award of the tribunal shall be 'final and binding' on parties, and shall additionally be deemed to be an order of the magistrate's court and enforceable accordingly. Under sub-s (2), the secretary of the tribunal is required to send a copy of the award to the magistrate's court within the
C jurisdiction and the court shall 'cause the copy to be recorded'. The Act further provides a criminal penalty where any person fails to comply with the award of the tribunal; on conviction a fine not exceeding five thousand ringgit or imprisonment not exceeding two years, or both, can be imposed. Such is the statutory setting of this consumer protection legislation. The legislative intention seems plain: to
D protect the consumer through a system of relatively speedy tribunal proceedings with finality and bindingness.

[4] I further said:

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> I set out the grounds with the full details in order to bring into focus the true nature of the application. It is in this connection that a matter of first principle intrudes: is this application in effect a request to this court to examine the merits of the claim, or is it a valid application to this court to exercise what is sometimes described as its 'supervisory review jurisdiction'? The first corresponds to an
F appellate jurisdiction, whereas the second is the proper province of judicial review under O 53.
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> The subject matter of this application may on one view be regarded as somewhat mundane, but even the mundane must be recognised, respected and protected by the law, if a decision maker exceeds the bounds of legality as determined by
G standards developed and articulated through case law.

[5] As far as the limits of judicial review are concerned, *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 has consistently been referred to by the Malaysian courts as good law. The oft-quoted per curium
H statement of Lord Brightman put the matter very clearly: 'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty
I of usurping power.' (at p 1173 of the report). This decision has been cited with approval in many local cases (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417, *Tanjung Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 125, to name a few).

[6] Despite being cited with approval in *R Rama Chandran* (Federal Court), the Malaysian position on judicial review has been extended beyond this preliminary premise of *merits* versus *process*. Edgar Joseph Jr FCJ held in clear terms as follows:

> It is often said that judicial review is concerned not with the decision but the decision making process (see eg *Chief Constable of North Wales Police v Evans*). This proposition, at face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Services Union & Ors v Minister for the Civil Service*, ... where the impugned decision is flawed on the ground of procedural impropriety.
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> But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for *process*, but also for *substance* (at pp 186 and 187 of the report).

[7] As observed in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288, *R Rama Chandran* has been approved and reaffirmed by the Supreme Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789 where the following passage appears:

> Until very recently, it was generally thought that when a decision is challenged on grounds of *Wednesbury* unreasonableness, the court is confined to an examination of the decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is always confined to the decision-making process and never with the merits was itself exploded by the landmark decision of this court in *R Rama Chandran v The Industrial Court & Anor* ... (per Gopal Sri Ram JCA at pp 797 and 798 of the report)

[8] Nevertheless, the Federal Court in *Petroliam Nasional Bhd* proceeds to express a view that the *Rama Chandran* approach is not an approach of general application, stating:

> Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge ... (at p 295).
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> In the same judgment, Steve Shim CJ (Sabah and Sarawak) took a view that *Rama Chandran* powers should only be invoked in appropriate cases (at p 295).

[9] After considering the case law, I concluded in that case (*Thanggaya*) as follows:

> I take this passage from the Federal Court to mean that a reviewing judge has no roving commission to descend into the merits of a decision being reviewed, unless an investigation into the merits can be supported on normal, accepted principles of review. Judicial review, however described or extended, is review, not appeal; a reviewing judge can, and should, only test an impugned decision on the ground of *'legality'* as opposed to correctness on the merits.
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> In reviewing the legality of a decision taken by a tribunal, such as the Consumer Claims Tribunal, this court can therefore only examine the *merits* or, as sometimes put, the *substance*, of a decision within a limited scope for the purpose of deciding whether the decision has not transgressed the bounds of legality, and no more. In other words, whether the tribunal has, or has not, fallen foul of the principles now commonly described as the principles of 'illegality' or 'irrationality', or both. This is of course in addition to the other principle of review — 'procedural impropriety' — for which no investigation of merits is necessary.

[10] When I applied these principles to the facts of *Thanggaya v MAS*, I had found that the award given by the tribunal was an award that no reasonable tribunal similarly circumstanced would have given, bearing in mind the very material error of law made by it.

[11] I might add here for completeness that even the ground of error of law, where it exists, cannot be regarded as an automatic entitlement to judicial review. The preponderant line of authority appears to support a more limited view, namely such an error will only vitiate a decision if it is 'an error of law on which the decision of the case depends' (*Pearlman v Keepers and Governors of Harrow School* [1979] QB 56) — in other words it must be material to the decision.

[12] Unlike the facts in *Thanggaya v MAS*, here I find the tribunal clearly making a finding of fact against the available evidence. If I am to accede to the applicant's argument, it will mean this court will be investigating the merits or justification of the decision on the basis of facts and evidence found by the tribunal. This is in essence an invitation to this court to exercise appellate powers, not judicial review jurisdiction. As I have indicated earlier, the first principle of judicial review is that review is concerned with the decision-making process, not the merits, substance or justification. The second principle is that there can be an exception to this first principle where the court can examine the substance or justification to satisfy itself that the decision maker has not transgressed the principles of procedural impropriety, illegality or irrationality (with a possible third principle, 'proportionality'). On the facts of this application, I cannot find any evidence of any of the following grounds, normally accepted as good grounds to support a review:

(1) Disregard of natural justice rules;

(2) Taking into account irrelevant factors;

(3) Omitting to take into account relevant factors;

(4) Misconstruction or misdirection on the applicable law;

(5) Acting on insufficient or no evidence;

(6) Manifest unreasonableness in the sense that no reasonable body of person in the same position could have come to the same conclusion;

(7) Error of law material to the decision;

(8) Excess of jurisdiction or acting beyond the limits of the relevant statutory powers;

(9) Erroneous or unsupportable inferences from the facts.

[13] The Consumer Protection Act 1999 creates the tribunal to achieve a fair and speedy justice for the aggrieved consumer. The statement of claim was filed with the tribunal on 20 September 2004, the statement of defence on 8 October 2004, the hearing was held on 13 October 2004 and decision rendered on 13 October 2004 itself. By the Act, as seen above, the tribunal's decision is expressed to be final and enforceable as an order of the magistrate's court when recorded with that court. This statutory framework is a clear indication that the High Court should be wary of examining the merits or substance of the tribunal's decisions, but should exercise its corrective jurisdiction only where it is clear that the tribunal has fallen foul of the acceptable standards of administrative law and justice, or administrative governance. To adopt a contrary stand will mean this court will be using the remedy of certiorari 'to cloak the exercise of appellate power'; *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1988] 2 MLJ 372.

[14] I do not find that the tribunal here has transgressed any of the principles of control and therefore I dismiss the application for judicial review for an order of certiorari as well as the application for payment of damages, with costs to be taxed unless agreed.

Application dismissed with costs.

Reported by Mashrifah Ravendran